STATE OF CONNECTICUT

FILE NO. 22046

STEPHEN NASH, SUCCESSOR CONSERVATOR OF CHARLA NASH, *CLAIMANT,*	:	OFFICE OF THE CLAIMS COMMISSIONER
V.	:	
STATE OF CONNECTICUT, *RESPONDENT.*	:	JULY 2, 2013

REQUEST FOR REVIEW

Pursuant to CGS Secs. 4-154c, 4-158(b) and 4-159(c) the Claimant requests that the General Assembly of the State of Connecticut review the decision of the Claims Commissioner J. Paul Vance, Jr. dated June 14, 2013 (the "Nash Decision"), in granting the Motion to Dismiss filed by the Respondent State of Connecticut Department of Energy and Environmental Protection ("DEEP").

This Request for Review is based upon clear error presented in the Nash Decision in both the rendition of the facts and, most critically, in the law cited therein as set forth below. The Nash Decision is further flawed in that it pointedly undermines directives of the General Assembly by thwarting clear and unequivocal statutory mandates promulgated by the General Assembly. Finally, the decision is flawed because it fails to recognize the unique position of the DEEP and the horrendous consequences that can and did befall a state resident when the DEEP, despite its manifest responsibilities, ignored its obligations to the Claimant and to all of the residents of Connecticut as set forth below.

I. The Nash Decision rendered by the Claims Commissioner reflects a misunderstanding of the law and of his own jurisdiction and authorization as the Claims Commissioner.

a. The Nash Decision states at page two that the Claims Commissioner has some discretion in reviewing claims, but that this discretion is "curbed by that statutory requirement that the State must have caused the damage or injury." This interpretation of the statute is blatantly in error. The Claims Commissioner improperly infused causation into the standard by which his decision should have been made regarding permission to sue the state. (Decision at page 2). That is incorrect as a matter of law. See CGS Sec. 4-160(a)[1]. Yet this is one of the fulcrums of the Claims Commissioner's decision to dismiss the claim. Proof of causation is admittedly a factor when the Claims Commissioner takes an action to either require payment on the state's behalf for amounts of less than $7,500.00, or when the Claims Commissioner makes a recommendation to the General Assembly for payment of a larger amount. See CGS Sec. 4-158(a). Those situations require that the Claims Commissioner deem the claim to be a "just claim" as defined in CGS Sec. 4-141[2]. In those cases, the

[1] CGS §4-160(a): When the Claims Commissioner deems it just and equitable, the Claims Commissioner may authorize suit against the state on any claim which, in the opinion of the Claims Commissioner, presents an issue of law or fact under which the state, were it a private person, could be liable (Emphasis added).

[2] CGS §4-141: As used in this chapter: ""Claim" means a petition for the payment or refund of money by the state or for permission to sue the state; "just claim" means a claim which in equity and justice the state

Claims Commissioner must be satisfied that the state did "cause" the injury or damage as he is opening up the state's coffers and either issuing a payment or representing to the legislature that the claim should be paid. However, when considering a request for permission to sue the state, the same standard does not apply. The standard for adjudging whether permission to sue should be granted is: when the Claims Commissioner deems it just and equitable, the Claims Commissioner "may" authorize suit when the claim presents an issue of law or fact in which the state, if it were a private person, "could" be liable. CGS §4-160(a). There is no requirement that the Claims Commissioner find that the claim is a "just claim". There is no requirement of proof of causation – direct or otherwise - because that issue is one which would be decided by a Superior Court Judge after a trial. The Claims Commissioner hobbled his own jurisdiction in a manner never contemplated by the statutes promulgated by the General Assembly, engrafting onto CGS Sec. 4-160 a causation requirement where none exists. The use of this erroneous standard in determining requests for permission to sue the state has harmed the Claimant and will harm any other claimants who are subjected to the same standard, one not sanctioned by the legislature of this state.

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should pay, provided the state has caused damage or injury or has received a benefit;...(Emphasis added).

b. Connecticut General Statutes Sec. 4-142 sets forth the jurisdiction of the Claims Commissioner. Therein, the Claims Commissioner "shall hear and determine all claims against the state...". The statute thereafter recites five instances in which the Claims Commissioner has no jurisdiction. Additionally, the legislature of this state has set forth specific enumerated sections of the Connecticut General Statutes, for which the Claims Commissioner has no jurisdiction to waive the state's immunity from liability or suit. CGS Sec. 4-165(c). The legislature set out clear parameters of the jurisdiction of the Claims Commissioner. Absent any of the referenced exceptions, the Claims Commissioner has jurisdiction to hear and decide any other claim against the state. The Claims Commissioner held in the Nash Decision that the statute in issue, CGS §26-55, was a regulatory statute and therefore he was without jurisdiction to grant permission to sue the state. But nowhere within the parameters of the jurisdiction of the Claims Commissioner as specifically set forth by the legislature is there an exception prohibiting the Claims Commissioner from granting permission to sue the state based upon the particular nature of the statute – one that is allegedly "regulatory". The Nash Decision flies in the face of the statutory authority granted by the legislature in that the legislature never exempted from the Claims Commissioner's jurisdiction claims arising from the "regulatory" nature of a particular statute.

c. In rendering the Nash Decision, the Claims Commissioner failed to address in any manner the negligence of the DEEP. In part, this failure results from the limited factual findings set out in the decision, discussed later herein. The Claims Commissioner focused instead upon a claim raised by the Respondent that the Claimant sought recompense based upon the failure of the state to control a third party. The claimant did not raise that claim. The claim of negligence, rather, is twofold: (1) the failure of the DEEP to have exercised its statutory mandate to seize an animal which did not have a permit as required by CGS Sec. 26-55 (discussed in d below) and authorized by CGS § 26-3; and further, (2) to have negligently failed to take any action to seize the chimpanzee after receiving warnings from residents of Connecticut and most remarkably, from its own expert in the field, the DEEP biologist tasked with oversight of exotic animals in Connecticut, whose memorandum (the "Memorandum") regarding the dangers posed by the chimpanzee were acknowledged and then ignored. This biologist's warnings included an outline of the dire consequences that could befall individuals coming into contact with the animal. No action was taken by the DEEP. The Claims Commissioner in the Nash Decision merely adopted the Respondent's reference to one section of the Restatement of Torts, which section is plainly inapplicable. Clear common law authority set forth in two different sections of the

Restatement of Torts provides strong legal authority for a finding that the DEEP owed a common law duty to the Claimant.

d. The Claims Commissioner misstated the law with respect to the ability of a resident to own a chimpanzee in the state at the time of the attack. At page 3 of the Decision, the Claims Commissioner states "[a]t the time Ms. Nash was attacked in February of 2009, there was no statute that "prohibited" the private ownership of the chimpanzee ...". In fact, CGS Sec. 26-55 at the time of the incident required that owners of all primates, except for primates weighting less than fifty pounds, obtain a permit. It further provided that primates without a permit (illegally possessed) shall be seized and disposed of. The statutory language is unambiguous and was so understood by the DEEP biologist who indicated in her Memorandum that CGS Sec. 26-55 prohibited the ownership of primates weighing in excess of fifty pounds. In the absence of a permit, the animal (without reference to private ownership or otherwise) shall be seized. In fact, as was presented to the Claims Commissioner, the DEEP relied upon this very statute some months before the incident, to seize a small primate from its owner based upon a violation of CGS §26-55. The finding in the Nash Decision that no statute prohibited the ownership of the chimpanzee muddled two different statutes, one that required such animals to have permits or be seized (CGS Sec. 26-55), with one that directly prohibited ownership of certain exotic animals, a statute later amended to include primates

within its prohibition. See CGS Sec. 26-40a. Irrespective of CGS Sec. 26-40a, under CGS Sec. 26-3, the DEEP had the unequivocal authority to seize an animal whose existence threatened public health and safety and under CGS Sec. 26-55, had the mandatory obligation to seize and dispose of an illegally possessed primate. The DEEP however, did nothing; it took absolutely no action, completely ignoring the danger that the primate posed to the citizens of the state of Connecticut.

e. The Nash Decision focused in large part on two issues- the supposed regulatory function of the relevant statute and the concept of a public duty versus a private duty. Both of these defenses are "governmental" in nature. The Claims Commissioner specifically ignored the clear intent of CGS Sec. 4-160(a) and (c). This legislation specifically provides that if permission to sue is granted, no governmental defenses can be raised as defenses in the lawsuit. The legislation incontrovertibly anticipates that there will be cases when it is just and equitable to permit suit even in the face of governmental defenses and those defenses are thereafter waived if permission to sue is granted. The Claims Commissioner, however, looked merely to the existence of governmental defenses and stopped his inquiry at that point, notwithstanding the clear intent of the statute to permit lawsuits even if governmental defenses such as "public duty" or regulatory functions exist.

Further, despite the Claims Commissioner's reliance upon supposed total immunity from suit in the event that the statute is regulatory in nature, the Connecticut Supreme Court in 1975 upheld a negligence claim against a municipality despite the regulatory function of the statute. Wright v. Brown, 167 Conn. 464 (1975). There simply is no carve out from any potential liability premised upon the regulatory nature of any statute as a stand alone legal concept.

II. The Factual Findings upon which the Claims Commissioner rendered the Nash Decision were pointedly brief[3] and ignored other relevant, undisputed facts that should have been critical to the Claims Commissioner's determination as to what is just and equitable.

The Claims Commissioner recited four undisputed and "relevant" facts as the factual foundation for his decision. He failed to include a number of undisputed and relevant facts that bear directly on the legal issues, both common law and statutory law. In the absence of a recitation of those undisputed and relevant facts, the Claims Commissioner failed to provide a just and equitable review of the claim. Three such relevant facts were (1)

[3] Factual Findings: 1. Travis, a chimpanzee, was owned by Sandra Herold of Stamford at all times relevant to this claim. 2. On or about February 16, 2009, Charla Nash was attacked by the chimpanzee while she attempted to assist Ms. Herold in getting the escaped chimpanzee into the house. 3. The Respondent DEP was aware that the chimpanzee was privately owned and resided with owner(s) in a Stamford residence. 4. Elaine Hinsch an employee of the DEP with knowledge regarding exotic animals in Connecticut, had proposed amendments to DGS §26-40a to categorize chimpanzees as dangerous animals and to prevent private ownership of same. The law was not changed until after Ms. Nash was attacked. Nash Decision pg. 3, dated June 14, 2013.

The amendment to CGS Sec. 26-55 grandfathering the owners of smaller primates of less than 50 pounds from the need to obtain permits. Testimony in legislative hearings presented to the Claims Commissioner showed that this amendment was directed at the single primate in the state of Connecticut that weighed more than 50 pounds, Travis the chimpanzee, the primate who attacked Charla Nash. (2) The Memorandum authored four months before the incident by a DEEP biologist who warned her superiors of the chimpanzee's dangerous characteristics and indicated that the existence of this animal in a residential setting was "an accident waiting to happen", yet no action was taken by the DEEP. (3) The DEEP exercised its legal authority to seize a primate in private ownership under CGS Sec. 26-55 and seized that primate a few months before the Claimant's incident on the basis that the owner of the primate was in violation of 26-55 in that he did not have a permit for the primate. (State of Connecticut v. Pierce Onthank, case 08-11596). These three facts should have been a part of the factual fabric that the Claims Commissioner used to come to his ultimate decision. These facts speak directly to the knowledge of the DEEP, changing any public duty argument into a clear case for a private duty to the Claimant and further, reflect the DEEP's own interpretation of CGS Sec. 26-55, that in the absence of a permit, an illegally possessed primate shall be seized. The absence of these three critical, relevant and undisputed facts in the Claims Commissioner's decision is astounding.

III. Conclusion

The Nash Decision allows the DEEP to avoid the consequences of its negligence and failure to act as mandated by statute. The Nash Decision sanctions such negligence while based upon erroneous legal conclusions and insufficient factual findings. The ramifications of the Nash Decision affect the Claimant and will affect any claimant seeking permission to sue the state if similarly situated. In justice and equity, Charla Nash deserves to have her day in court, to have her opportunity to present her case to a judge of the Superior Court, to have her rights adjudged in accordance with longstanding legal principles. It is only in that impartial forum that the evidence and law can be objectively reviewed and fairly determined. The Claimant, therefore, respectfully requests that the Nash Decision be reviewed by the General Assembly pursuant to CGS Sec. 4-159(c) and that permission to sue the state be granted to the Claimant.

Respectfully Submitted
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CERTIFICATION

This is to certify that a copy of the foregoing has been mailed, certified, Return Receipt Requested, on July 2, 2013, to:

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